

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. 2003-028
BALDWIN PARK MARKETPLACE PROJECT

INTRODUCTION

On October 16, 2003, the Director of the Department of Industrial Relations ("Department") issued a public works coverage determination (Determination") finding the Baldwin Park Marketplace Project ("Shopping Center Project") to be a public works subject to the payment of prevailing wages. On November 14, 2003, Lewis Investment Company ("Developer") administratively appealed the Determination. Developer's appeal raises no significant issues not already addressed in the Determination.¹ Therefore, for the reasons set forth in the Determination, Developer's appeal is denied and the Determination is incorporated by reference herein. This decision constitutes final administrative action in this matter.

Subsequent to Developer's appeal, however, Near-Cal Corporation ("Near-Cal"), Wal-Mart's general contractor, filed suit against the Department alleging that the Determination erroneously covered as public works the construction Near-Cal performed for Wal-Mart on the Shopping Center Project site. Because the Determination did not specifically address the work performed by Near-Cal for Wal-Mart, the Department, Near-Cal, and Developer agreed that, in exchange for dismissal of the lawsuit, the Director would determine the public works status of Near-Cal's work as part

¹ Developer's only new issue on appeal is whether a public agency has to be a party to the construction contract. See, footnote 3, *infra*.

of this administrative appeal.² For the reasons set forth below, the Director finds that Near-Cal's construction of the Wal-Mart "super center," which was paid for in whole with private funds on property purchased from Developer at fair market value, is not a public works.

FACTS

The facts as set forth in the Determination will not be repeated here. The following additional facts have since come to light. In order for the Shopping Center Project to be viable, Developer needed an anchor tenant. Developer approached a number of possible anchor tenants, none of whom expressed interest. Eventually, Wal-Mart agreed to be the anchor tenant for the Shopping Center Project. Wal-Mart was not a party to the Disposition and Development Agreement ("DDA") between Developer and Baldwin Park Redevelopment Agency ("Agency"). Wal-Mart structured its purchase agreement with Developer for Wal-Mart to avoid the receipt of public funds and subsidies.

Before Wal-Mart agreed to build, it sought assurances that the purchase price it paid for the property included the value of any publicly-assisted construction by Developer or Agency. Before Developer undertook its construction obligations under the DDA, Developer obtained an appraisal. The appraisal determined the fair market value of the property, after Agency paid for relocation, demolition, clearance of existing structures and rough grading, to be \$11.00 per square foot, which is the price Developer paid. In addition, with public funds and a Developer contribution, Agency undertook and paid for construction of off-site infrastructure improvements. With private funds, Developer then prepared the Shopping Center Project site for further development by, among other things, constructing building

² Near-Cal also argues that the Shopping Center Project is not a public works based on the identical grounds in Developer's appeal. For the reasons stated in the Determination, Near-Cal's arguments are rejected.

pads. In August 2003, Wal-Mart purchased from Developer 13 acres, including a concrete building pad constructed by Developer. Under the purchase agreement between Developer and Wal-Mart, Wal-Mart paid \$13.00 per square foot for the property, \$2.00 more than the price Developer had paid. Near-Cal asserts \$13.00 per square foot is the fair market value, using the appraisal's \$11.00 per square foot figure as a starting point and adding \$2.00 for the value of the improvements. Agency was not a party to the purchase agreement between Developer and Wal-Mart.

After Wal-Mart acquired the property, Wal-Mart hired Near-Cal to build a Wal-Mart super center. Near-Cal was not involved in Developer's or Agency's construction; neither Agency nor Developer was involved in the Wal-Mart construction.

DISCUSSION³

Under what is now Labor Code section⁴ 1720(a)(1), public works is defined in part as construction performed under contract and paid for in whole or in part with public funds. The work performed by Near-Cal for Wal-Mart was construction done under contract. The question at issue on appeal is whether the construction of the Wal-Mart super store ("Wal-Mart construction") was paid for with public funds. As already decided in the Determination, the Shopping Center Project was paid for in part with public funds and therefore it is a public works.

A determination whether the Wal-Mart construction is paid for with public funds requires an analysis whether the

³ Developer and Wal-Mart argue that a public entity has to be a party to the construction contract for a project to be a public works. Labor Code section 1720 has never been interpreted by the Director or by the courts to require a public entity to be a party to a construction contract. (See, PW 98-005, Goleta Amtrak Station (November 23, 1998); PW 2002-047, Legacy Partners Project/City of Concord Redevelopment Agency (October 29, 2003).) Labor Code section 1720 contains no such requirement. This argument is therefore rejected.

⁴ All section references are to the Labor Code, unless otherwise specifically provided.

Wal-Mart construction is a separate project from the Shopping Center Project. If the Wal-Mart construction is not a separate project, the public works status of the Shopping Center Project would extend to the Wal-Mart construction because the Wal-Mart construction would be deemed paid for in part with the Agency subsidies to Developer. If the Wal-Mart construction is a separate project, then an analysis must also be performed whether the Wal-Mart construction by itself fulfills the elements of a public works.

In the precedential case of PW 2000-016, *Vineyard Creek Hotel and Conference Center/Redevelopment Agency, City of Santa Rosa* (October 16, 2000), the overarching question was whether a development undertaken by a single developer and paid for with a mix of public and private funds constituted one or several projects.⁵ In *Vineyard Creek*, the Director set forth factors that can be examined on a case-by-case basis to determine whether a construction undertaking is part of a single integrated project or is a separate project. These factors include: (1) the manner in which the construction is organized in view of, for example, bids, construction contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of construction. Here, these factors are applied to analyze the

⁵ Relying on *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, Wal-Mart summarily argues that *Vineyard Creek* is an underground regulation and therefore should have been rescinded by the Governor's Executive Order S-2-03. Public works coverage determinations are not regulations subject to rulemaking requirements because they are directed to specific parties about a specific set of facts. (*Tidewater v. Bradshaw*, *supra*, 14 Cal.4th 557, 571.) *Tidewater* states that opinion letters may serve as precedent in similar future cases; that does not make an opinion letter an underground regulation. Public works coverage determinations are similar to opinion letters. Moreover, the decision whether to designate a determination as precedential is statutorily exempt from rulemaking requirements and unreviewable by the courts. (Gov. Code § 11425.60.) Notwithstanding the above, in light of the decision here, this issue is moot.

relationship between the Wal-Mart construction and the Shopping Center Project.

With regard to the first factor, the manner in which the construction is organized, the Wal-Mart construction was performed by Near-Cal under a separate construction contract than that controlling the construction of the Shopping Center Project. The construction of the Shopping Center Project was performed by a different contractor or contractors. Wal-Mart is not a party to the DDA between Developer and Agency.

With regard to the second factor, physical layout of the Project, the Wal-Mart construction occurred on the site of the Shopping Center Project, a public works. As provided for in the DDA, Wal-Mart is an "anchor tenant" at that site.

With regard to the third factor, oversight, direction and supervision of the work, neither Agency nor Developer appears to have had any direct control or oversight over the Wal-Mart construction. Under the DDA, Wal-Mart must conform, to the extent possible, to unifying design elements devised by Developer and approved by Agency.

With regard to the fourth factor, financing and administration of the construction funds, Wal-Mart funded the Wal-Mart construction with its private funds. It purchased the 13-acre property from Developer at fair market value.

With regard to the fifth factor, general interrelationship of the various aspects of construction, there does not appear to be any further interrelationship between the construction of the Shopping Center Project and the Wal-Mart construction.

The facts of this case weigh in favor of finding the Wal-Mart construction to be a separate project. The Wal-Mart construction and the Shopping Center Project were generally independent undertakings. Neither Agency nor Developer

oversaw or supervised the Wal-Mart construction. Wal-Mart privately funded its construction. It paid fair market value for the property on which the super store was built which, under the particular facts of this case, insulated Wal-Mart from the public subsidies received by Developer.

The facts of this case are similar to PW 2003-022, *Chapman Heights/City of Yucaipa* (January 30, 2004), which involved the construction of merchant builder residential developments and adjacent infrastructure improvements. In *Chapman Heights*, the relationship between the privately-funded housing and the publicly-funded infrastructure was found "too attenuated" and therefore not grounds for finding the parts to be integrated. Similarly, here, the relationship between the off-site infrastructure, site preparation and on-site Developer improvements, on the one hand, and the Wal-Mart super store, on the other, is too attenuated to find that Agency subsidies to Developer passed through to the Wal-Mart construction.

Therefore, in view of the facts of this case, the Wal-Mart construction is deemed to constitute a separate, privately funded project that is not subject to prevailing wage obligations.

CONCLUSION

In summary, for the reasons set forth in the Determination, the appeal filed by Developer is denied, and the Determination finding the Shopping Center Project to be a public works is affirmed. In addition, for the reasons set forth above, Near-Cal's construction of the Wal-Mart super store is not a public works. This decision constitutes final administrative action in this matter.

Dated

28 June

✓ JOHN M. Rea

John M. Rea, Acting Director